TofC/SH/5

Commissioner's File: CA/126/1989

SOCIAL SECURITY ACTS 1975 TO 1986

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Name: Marilyn Harrison (Mrs), Appointee of Joanne Harrison (Miss)

Social Security Appeal Tribunal: Truro

Case No: 333/02619

[ORAL HEARING]

1. This is a claimant's appeal, brought with the leave of the tribunal chairman, against an ostensible decision on the part of the social security tribunal of 4 January 1989 purporting to have decided a preliminary issue. Our unanimous decision is that the determination of such preliminary issue does not constitute a decision and consequently does not afford us jurisdiction to entertain an appeal thereon.

2. We held an oral hearing of the appeal. The claimant's appointee attended and was represented by Mr Mark Rowland, of counsel, instructed by Ms V Chapman, solicitor, of the Child Poverty Action Group. The adjudication officer appeared by Mr M Parke, of the Solicitor's Office of the Departments of Health and Social Security.

3. The claimant in this case was born on 2 July 1969. Since infancy she has been severely disabled. Since December 1971 she has been accepted as satisfying at least one of the day and one of the night conditions which are prescribed in respect of entitlement to attendance allowance. Basic entitlement has, accordingly, from 1973 when two different rates were introduced, been at the higher rate. Since the claimant attained the age of 16 her mother has been the appointee in respect of social security benefits. As the claimant's 16th birthday approached, a renewal claim was made in respect of the allowance. That resulted in an award at the higher rate for the inclusive period from 8 July 1985 to 29 May 1995. But the events giving rise to this appeal took place before that period.

4. In the vicinity of the claimant's home was a hospital ("the Hospital") for mentally handicapped children. Beginning on 25 February 1982 the claimant spent intermittent short spells as an in-patient there. The pattern appears to have been -

(a) Thursday night in each week; and

(b) Friday, Saturday and Sunday night on each fourth weekend.

So far as we understand the position, those spells were for the relief of the claimant's parents rather than for any direct benefit to the claimant herself. It seems to be common ground that the accommodation thus provided for the claimant was made available in pursuance of paragraph 2 of Schedule 8 to the National Health Service Act 1977.

5. Regulation 7 of the Social Security (Attendance Allowance) (No. 2) Regulations 1975 [SI 1975 No 598] provides as follows:

"7. - (1) Section 35(6) of the Act (attendance allowance not payable in certain circumstances) shall have effect in relation to a child in accordance with the following provisions of this regulation and attendance allowance shall not be payable in respect of a child for any period during which -

(a) .....

(b) the child is living in accommodation -

(i) provided for him in pursuance of Part III of the National Assistance Act 1948, paragraph 2 of Schedule 8 to the National Health Service Act 1977, or Part IV of the Social Work (Scotland) Act 1968, or

(ii) provided for him in circumstances in which the cost of the accommodation is being borne wholly or partly out of public or local funds in pursuance of a Scheduled enactment, or

(iii) .....

(c) ....."

(2) Subject to paragraph (2A) where any person was entitled to attendance allowance in respect of a child for the period immediately before that child entered any accommodation mentioned in sub-paragrpah (1)(a) or (1)(b) or that child commenced to undergo any treatment mentioned in sub-paragraph (1)(c) as the case may be, those sub-paragraphs shall not apply to the first 4 weeks of any period during which the child is in such accommodation or is undergoing such treatment, so however for the purposes of this paragraph -

(a) 2 or more distinct periods separated by an interval not exceeding 28 days, or by 2 or more such intervals, shall be treated as a continuous period equal in duration to the total of such distinct periods and ending on the last day of the later or last such period;

(b) any period or periods to which sub-paragraph (1)(a), (1)(b) or (1)(c) refers shall be taken into account and aggregated with any other period to which the other sub-paragraphs refer."

6. It is not in dispute that, by virtue of the intermittent short spells spent by the claimant as an in-patient in the Hospital, attendance allowance ceased to be payable for certain periods pursuant to regulation 7(1)(b)(i) and 7(2) and that the circumstances leading to that result only came to light in consequence of a renewal claim form signed by the appointee on 19 February 1985. It was not until May 1988 that the adjudication officer came to act on the information, but on some unspecified date during that month he issued a decision which -

(a) reviewed the decision awarding attendance allowance at the higher rate from 15 October 1979;

(b) revised that decision in respect of the period from and including 30 September 1983;

(c) threw up from such revision an overpayment of attendance allowance in the sum of £336.28 in respect of the period from 30 September 1983 to 7 July 1985;

(d) determined that of that total sum the sum of £254.57 (overpaid in the period from 30 September 1983 to 24 February 1985) was recoverable by the Secretary of State on the ground that the appointee had failed to disclose the material fact (or facts) of the claimant's admissions to the Hospital; and

(e) determined that the balance of £81.71 (overpaid in the period from 25 February 1985 to 7 July 1985) was not recoverable by the Secretary of State because that overpayment had not resulted from any material misrepresentation or non-disclosure by the claimant's appointee.

On behalf of the claimant are urged (not, perhaps, very strenuously) certain points arising out of the interpretation and application of the relevant provisions of the Attendance Allowance (No. 2) Regulations. But it is primarily in respect of that part of the adjudication officer's decision which we have paraphrased under sub-paragraph (d) above that the claimant appealed to the appeal tribunal. And central to that head of the appeal was a question of law: Which statutory provision falls to be applied to the repayment/recoverability issue? That question is treated in detail in paragraphs 13 to 41 below, in which are set out the respective views of the majority of the Commissioners and of the dissenting Commissioner on this Tribunal. But at this stage we are giving the reasons for our unanimous decision as set out in paragraph 1 above, and we here say no more about the repayment/recoverability issue than is necessary to render those reasons intelligible.

7. For just over 25 years the obligation to repay non-means tested benefit which had been overpaid hinged upon the well-known "due care and diligence" test. That test replaced the "good faith in all respects" test and was introduced by section 9(1) of the Family Allowances and National Insurance Act 1961. (The section was brought into force with effect from 26 February 1962.) In its final legislative manifestation the "due care and diligence" test was to be found in section 119 of the Social Security Act 1975. We quote the first two subsections thereof:-

"119. - (1) Where benefit is or has been paid in pursuance of a decision which is reversed or varied on appeal, or is revised on a review, then, subject to subsection (2) below, the decision given on the appeal or review shall require repayment to the Secretary of State of any benefit which was paid in pursuance of the original decision to the extent to which it -

(a) would not have been payable if the decision on the appeal or review had been given in the first instance; and

(b) is not directed to be treated as paid on account of the benefit awarded by the decision on appeal or review, or as having been properly paid.

(2) A decision given on appeal or review shall not require repayment of benefit paid in pursuance of the original decision in any case where it is shown to the satisfaction of the person or tribunal determining the appeal or review that in the obtaining and receipt of the benefit the

beneficiary, and any person acting for him, has throughout used due care and diligence to avoid overpayment."

But both those subsections were repealed in toto by the combined effect of section 86(2) of and Schedule 11 to the Social Security Act 1986. By a legislative process to which we return in more detail below, the repeal took effect from 6 April 1987; and on the same day there came into force the whole of section 53 of the Social Security Act 1986. We quote section 53(1):

"53. - (1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure -

(a) a payment has been made in respect of a benefit to which this section applies; or

(b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,

the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose."

And by virtue of subsection (10), section 53 applies to, inter alia, benefits under the Social Security Act 1975.

8. So the "due care and diligence" test was abolished and replaced, right across the board, by the "misrepresentation or non-disclosure" test, which had come onto the scene in section 45(1) of the National Assistance Act 1948; re-emerged (in the context of supplementary benefit) in section 26(1) of the Ministry of Social Security Act 1966 (later renamed the Supplementary Benefit Act 1966); and first came within the jurisdiction of the Commissioner in the form of section 20(1) of the Supplementary Benefits Act 1976. But in deciding the question of repayment or recoverability was the new test to be applied in respect of overpayments occurring before 6 April 1987? The tribunal decided as a preliminary issue that it was.Its recorded findings of fact opened thus:

"By agreement between all parties concerned and the Tribunal no finding of fact w made in this matter at this stage because the Tribunal was asked to decide prelimina questions of law as to whether Section 53 of the Social Security Act 1986 or Section 119 of the Social Security Act 1975 applied to this matter."

In the box on the relevant Form AT3 devoted to the tribunal's decision was recorded:

"This matter is adjourned sine die but on a preliminary question of law the Tribunal found that Section 53 of the Social Security Act 1986 would apply to the appeal rather than Section 119 of the Social Security Act 1975. Leave to appeal on this preliminary question of law granted."

And it is thus that the case comes before us.

9. But is there anything before us in respect of which we have jurisdiction to give a decision? Our jurisdiction is entirely statutory. Since 6 April 1987 section 101(1) of the Social Security Act 1975 has provided thus:

"101. -(1) Subject to the provisions of this section, an appeal lies to a Commissioner from any decision of a social security appeal tribunal on the ground that

the decision of the tribunal was erroneous in point of law."

What - in that context - is a "decision"? We accept the submission of Mr Rowland that it will not suffice simply to demonstrate that something has been determined by an appeal tribunal. We were referred to the Commissioner's decision in R(I) 6/81. In issue in that case was a medical appeal tribunal's refusal of a claimant's application for leave to withdraw his appeal to that tribunal; but helpful guidance was given on the interpretation of "decision" in the context of the Commissioner's jurisdiction. We quote:

> "I hold that a ruling by a medical appeal tribunal or by the Commissioner as to whether an application to withdraw an appeal should be granted or refused is not a 'decision', but is the equivalent of an 'interlocutory order' in litigation before the ordinary courts cf. R(I) 14/65, para. 6. A distinction is customarily made in all types of litigation between a final decision or judgment and an interlocutory (or interim) order. The final decision or judgment constitutes "res judicata" and the only method of altering it thereafter is by review or appeal, whereas an interlocutory or interim order is susceptible of being revoked or varied on an application by the parties during the course of the proceedings leading up to the final decision or judgment." (From paragraph 26)

We respectfully agree. The word "decision" in section 101(1) of the Social Security Act 1975 is to be construed as meaning "final decision"; ie such a decision as finally disposes of the relevant proceedings before the appeal tribunal. In the case with which we are concerned no such decision has been made by the appeal tribunal. That, indeed, appears expressly from the passages from the relevant Form AT3 which we have quoted in paragraph 8 above; and Mr Parke freely conceded that there was no way in which the entries on that form could be construed as finally disposing of the proceedings before the appeal tribunal.

10. We add certain comments of a more general nature. The courts of England have never been enthusiastic about the isolating of preliminary points of law. Mr Rowland cited to us Tilling v. Whiteman [1980] AC 1. In his speech Lord Wilberforce said this:

> "Miss Whiteman did not yield up possession as she had agreed, so the owners brought proceedings in the Canterbury County Court for possession and other relief. Pleadings were exchanged, and the case came on for trial in May 1977 with both sides legally represented. The learned judge took what has turned out to be an unfortunate course. Instead of finding the facts, which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken, whether Case 10 [of Schedule 3 to the Rent Act 1968] applies to a case where there are joint owners one only of which requires the house as a residence. So the case has reached this House on hypothetical facts, the correctness of which remain to be tried. I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of Courts of Appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional." (At pp 17-18)

And at p 25 Lord Scarman said this:

> "The case presents two disturbing features. First, the decision in the county court was upon a preliminary point of law. Had an extra half-hour or so been used to hear the evidence, one of two consequences would have ensued. Either Mrs Tilling would have been believed when she said she required the house as a residence, or she would not. If the latter, that would have been the end of the case. If the former, your Lordships' decision allowing the appeal would now be final. As it is, the case has to go back to the county court to be tried. Preliminary points of law are too often treacherous short

cuts. Their price can be, as here, delay, anxiety, and expense."

11. Those quotations fortify us in reaching the construction which we have put upon "decision" in the context of section 101(1) of the Social Securiry Act 1975. We should have required the clearest language to persuade us that it was the legislature's intention that preliminary points of law should be carried to the Commissioner from appeals part-heard before the social security appeal tribunal. It is not, perhaps, without significance that, with reference to medical appeal tribunals, clear language did appear in the 1975 Act, only 11 sections after the section which we have been considering. Section 112(4) provided thus:

> "(4) Where a question of law arises in a case before a medical appeal tribunal, the tribunal may refer that question to a Commissioner for his decision."

In practice, that subsection was hardly ever invoked; and it was repealed in toto by the Social Security Act 1989 (section 31(2) and Schedule 9).

12. So our unanimous decision is that there is not before us any such decision of the appeal tribunal as gives us jurisdiction to entertain an appeal at this stage (cf paragraph 1 above). But the substantive (as opposed to procedural/jurisdictional) issue raised by these proceedings is obviously of considerable importance. Both Mr Rowland and Mr Park addressed us fully upon that issue; and invited us to express our views in respect thereof. That we now do. But, of course, those views are, technically, obiter dicta; and they are not unanimous.

Is the repayment/recoverability of the sum overpaid in this case governed by section 119 of the Social Security Act 1975 or by section 53 of the Social Security Act 1986?

Observations of Mr J Mitchell and Mr A T Hoolahan

13. It was common ground before us that the law of England has always leaned against retrospective legislation. Certain common law principles are enshrined in section 16(1) of the Interpretation Act 1978:

> "16. -(1) Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears, -
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect;
>
> (b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against that enactment;
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

(Section 15 deals with a repealing enactment which is itself repealed and has no bearing

upon this case.)

14. In Lauri v Renad [1892] 3 Ch 402, at p 421, Lindley LJ said this:

> "It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary." (Our emphasis)

At the date when Lauri v Renad was decided the Interpretation Act 1889 was in force. (Section 38(2) thereof was in substantially the same terms as section 16(1) of the Interpretation Act 1978.) But the legislation which was directly in point in that case ante-dated the passing of the 1889 Act - and the 1889 Act is not referred to in the judgments of the Court of Appeal. But the fact that the foregoing passage from the judgment of Lindley LJ is quoted (with apparent approval) on pp 387-8 of Craies on Statute Law, seventh edition, indicates to us that it is regarded as expressing what is still the proper approach to legislation which has a potentially retrospective effect.

15. Much more recently than Lauri v Renad the Privy Council gave judgment (in the form of advice to His Majesty the Yang di-Pertuan Agong of Malaysia) in Yew Bon Tew v Kenderaan Bas Mara [1983] AC 553. At pp 558-9 Lord Brightman said this:

> "Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. [Our emphasis] A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. [That sentence adopts, almost verbatim, a sentence on p 387 of Craies op cit.] There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.
>
> But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (e.g., because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (e.g., because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself."

(Yew Bon Tew was invoked by the House of Lords in the relatively recent case of Arnold v CEGB [1988] AC 228 - see Lord Bridge of Harwich at pp 265-266.)

16. Two basic questions arise from the passages which we have quoted in paragraphs 13 to 15 above:

(a) Had the claimant, at the date of the repeal of section 119(1) and (2) of the Social Security Act 1975, acquired any right thereunder which was taken away or impaired by the repeal of those subsections?

(b) If so, was the relevant change in the law purely procedural?

We turn to those questions straightaway; and we do not think that our answers to them differ fundamentally from the views thereon of the dissenting Commissioner.

17. It is not, of course, true to say that section 53 necessarily imposes on a claimant more stringent obligations than those imposed by section 119; but it is, surely, beyond argument that the respective obligations are by no means identical. In the present case, for example, the section 119 test would avail the claimant if her appointee could establish that it was through no want of due care and diligence that she did not make timely disclosure to the Department of her daughter's spells in the Hospital. But that, of course, would not suffice in the context of section 53. In that latter context it matters not whether material non-disclosure is innocent or fraudulent. At the date of - and, indeed, for some time after - the overpayments the appointee had, accordingly, a potential shield against a requirement for repayment. To put it another way, she had a vested right to retain the overpaid sum provided that she could make out a case of due care and diligence. That shield was removed by the repeal of section 119(2). That right was taken away by that repeal. Mr Parke submitted that the right had not vested at the date of the repeal. It was merely contingent in that the appointee had neither need nor opportunity to invoke it until an adjudication officer gave his mind to the repayment/recoverability issue. We cannot accept that submission. Many "rights" are, jurisprudentially, essentially defences. Their invocation will inevitably be postponed until some claim or similar process is initiated by another party against the party who is entitled to assert such right. The Yew Bon Tew case seems to us to be decisive of this point. The plaintiffs had been injured on 5 April 1972 in a collision with a bus operated by a public authority. At that date the Public Authorities Protection Ordinance 1948 imposed a 12 months' limitation period in respect of actions in negligence brought against public authorities. That period came and went - and no proceedings were started. In June 1974 the Public Authorities Protection (Amendment) Act 1974 came into force. That Act substituted a period of three years for the 12 months previously provided for by the Ordinance of 1948. On 20 March 1975 the plaintiffs issued their writ. The defendants pleaded that the action was statute barred. The judge in the High Court held that the action was not barred. The Federal Court held that the defendants' right to plead the time-bar which had accrued on 5 April 1973 was a right protected by the (Malaysian) Interpretation Act 1967 and was not affected retrospectively by the Act of 1974. (Section 30((1)(b) of the 1967 Act was in substantially the same terms as is section 16(1)(c) of our own Interpretation Act 1978.) The Judicial Committee of the Privy Council dismissed the plaintiffs' appeal thereto. We note that counsel for the defendants were not called upon to argue. In the judgment delivered by Lord Brightman (from which we quote again when we turn to the "purely procedural" issue) it is made clear that entitlement to plead the time-bar was an accrued right protected by section 30(1)(b) of the (Malaysian) Interpretation Act 1967.

18. Mr Rowland also referred us to the Privy Council cases of Director of Public Works v Ho Po Sang [1961] AC 901 and Free Lanka Insurance Co Ltd v Ranasinghe [1964] 541. Helpful passages were cited to us as to the meaning of "any right .... acquired"; and as to the distinction between a right and a mere hope. We need not here comment further than to say that those passages confirm us in the view which we have expressed in paragraph 17 above.

19. But did the divesting of the appointee of her accrued right to rely upon the due care and diligence criterion amount to nothing more than a "purely procedural" change in the law? Mr Parke submitted to us that the change amounted to no more than the conferment upon claimants of a new procedural defence to a requirement for repayment. To be fair to Mr Parke, we do not think that he advanced that limb of his argument with any great optimism. He was in obvious difficulty when we put to him the proposition that all rights pleaded by way of defence are, in a sense, asserted "procedurally". In Yew Bon Tew itself the limitation issue was brought into play by the defendants' pleaded defence, as is apparent from our quotation in paragraph 15 above. The Privy Council was well aware of the equivocal, and potentially misleading, meanings which can be attributed to both

"retrospective" and "procedural". We quote again from Lord Brightman:

> "Their Lordships consider that the proper approach to the construction of the Act of 1974 is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations ..... A limitation act may therefore be procedural in the context of one set of facts, but substantive in the context of a different set of facts. In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act whhich is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable." (At p 563, our emphasis)

20. There happens to be the authority of an earlier Commissioner on this very point (although we fault neither Mr Rowland nor Mr Parke for having overlooked it). In paragraph 7 above we pointed out that, by virtue of section 9(1) of the Family Allowances and National Insurance Act 1961, the "due care and diligence" test replaced the "good faith in all respects" test. Paragraph 26 of decision R(G) 9/62 reads thus:

> "In my judgment section 9 deals with substantive rights and not merely with procedural matters. It in effect describes the circumstances in which a person may retain benefits actually received and not merely the machinery for deciding about such matters or recovering the benefit."

The phrase "the machinery for .... recovering the benefit" was prescient. By itself it suffices to distinguish from the case now before us the judgments in the Court of Appeal in Regina v Secretary of State for Social Services, Ex parte Britnell, a copy of the transcript of which is in the papers. We have no hesitation in concluding that the replacement of section 119(2) of the 1975 Act by section 53(1) of the 1986 Act wrought a change in substantive rights and was not merely procedural.

21. But where is the effect of that change to be fitted into the chronology of any particular case? In an overpayment/repayment case at least three dates are of potential significance:

(a) the date of overpayment;

(b) the date when the overpayment comes to the notice of the Department; and

(c) the date of the relevant reviewing decision and/or determination that the overpaid sum is repayable/recoverable.

If all three such dates fall after the coming into force of section 53, obviously no problem arises. But what if all three do not so fall? The wording of the section itself affords no guidance. In that respect it is to be contrasted with section 9(1) of the Family Allowances and National Insurance Act 1961, which opened thus:

> "9. -(1) Where benefit is (or has before the coming into force of this section been) paid in pursuance of a decision which is reversed or varied on appeal, or is revised on a review, then ...."

That, in our view, is an example of the type of clear language, allowing of only one construction, which is referred to in the short passages which we have emphasised in our quotations in pargraphs 14, 15 and 19 above. It is, surely, permissible to wonder why, if it really was the intention of Parliament that section 53 should be the yardstick in all repayment/recoverability determinations (no matter when the overpayment had been made), the draftsman did not avail himself of the simple and unambiguous formula which was so

readily to hand. (We should find it almost inconceivable that a draftsman sitting down to draft the repeal and replacement of a legislative provision would not at least glance at the form in which that provision first entered the legislation of the land.)

22. At the initial hearing before us Mr Parke did not attempt to argue that the language of section 53 itself came near to the unambiguous clarity required to give a statute retrospective effect. At the adjourned hearing (to which we refer in more detail in paragraph 31 below) he expressly made the point which is accepted by the dissenting member of this Tribunal in paragraph 39 below. We are not ourselves persuaded by that point. It seems to us merely to beg the central question. We are unable to accept that the opening words of section 53 ("Where it is determined that ....") unambiguously deprive a claimant of an already accrued right to avail himself of the "due care and diligence" shield. But at both the initial and the adjourned hearings Mr Parke contended vigorously that the required degree of clarity can be found in the statutory instrument which brought section 53(1) into operation. That instrument was the Social Security Act 1986 (Commencement No. 4) Order 1986 [SI 1986 No 1959] ("the Commencement Order"); and to that we now turn.

23. The primary legislation repealing section 119(1) to (2A) of the Social Security Act 197[illegible] is to be found in section 86(2) of and Schedule 11 to the Social Security Act 1986. But - as almost invariably the case with social security primary legislation - the bringing into force of most of the provisions of that Act was left to statutory instrument (see section 88). So postponed were the whole of section 53 and the provisions repealing section 119(1) to (2A) of the 1975 Act. The combined effect of article 2(b) of and Part II of the Schedule to the Commencement Order was to -

(a) bring into force the whole of section 53, and

(b) repeal section 119(1) to (2A) of the 1975 Act,

with effect from 6 April 1987. The Commencement Order was directed to many provisions of the 1986 Act; but special, additional provisions were made in respect of (a) and (b) immediately above. We quote article 4:

"4. -(1) The bringing into operation of subsections (1), (2), (4) and (5) of section 53 (overpayments) and of the repeal, in whole or in part, of the enactments specified in paragraph (2) of this article (overpayments and set-off) and the provisions by which those enactments have been amended shall not ha[illegible] effect in relation to any review of, or appeal from, any determination, fir[illegible] made before 6th April 1987, of any question of repayment or recoverability under those enactments.

(2) The enactments specified for the purposes of paragraph (1) of this article are -

Section 8 of the Family Income Supplements Act 1970.

Sections 86 and 119 of the Social Security Act 1975.

Section 20 of the Supplementary Benefits Act 1976."

Article 4, submitted Mr Parke, is couched in terms which make it quite plain that section 53 is to have retrospective effect save for the cases expressly excepted by that article; and, of course, the dissenting member of this Tribunal takes the same view. We, for our part, do not; but we make no pretence to finding the issue entirely clear-cut.

24. As we understand it, the argument in favour of retrospective effect proceeds thus:

Article 4 expressly provides that in certain specified cases section 53 shall not have any retrospective effect; the implication must be, therefore, that in all other cases it shall have retrospective effect. Although we do not remember the maxim's being invoked at the hearing, that approach would seem to reflect an application of expressio unius est exclusio alterius. In general that maxim, of course, embodies a sound principle of statutory construction. But we are of the view that its application to the legislation in point in this case is inapposite. We explain why.

25. In law, as in logic, exceptions to a proposition are otiose, indeed meaningless, until that proposition has been established. In paragraphs 13 to 15 above we sought to demonstrate the strength of the presumption in English law (both at common law and by statute) against a statute's having retrospective effect. If it is to have retrospective effect that must be plainly spelled out. Until that is spelled out, it is, surely, pointless - albeit harmless - to prescribe specific cases in which the statute is not to have retrospective effect. We are unable to accept that the bare prescription of such exceptions is, of itself, a clear and unambiguous statement that the statute is to have retrospective effect. Does the bare prescription of such exceptions render "unavoidable" any construction other than that the statute (or the relevant provision thereof) is to have retrospective effect? We think not. Manifestly the so-called "saving provisions" in article 4 would have been meaningful and significant had section 53 opened with (or contained) words equivalent to the opening words of section 9(1) of the Family Allowances and National Insurance Act 1961 (cf paragraph 21 above). But it did not; and no comparable words are to be found anywhere else in the relevant legislation. In our view, the "saving provisions" actually saved nothing. They were a somewhat superfluous declaration of what would - in their absence - have been the position both at common law and pursuant to the Interpretation Act 1978.

26. Expressio unius est exclusio alterius is not, in our view, susceptible of universal application. In the course of the hearing was canvassed a simple - and, we hope, not over-frivolous - pair of hypotheses:

(a) A statute devoted to dogs, cats and horses contains a provision to the effect that, for the purposes of section X, dogs and cats shall be deemed not to be animals.

(b) A like statute contains a provision to the effect that, for the purposes of section Y, dogs and cats shall be deemed to be animals.

(For the purposes of the hypotheses neither of the notional statutes contains any further guidance to the meaning to be given to "animal".) Manifestly the maxim with which we began this paragraph would, in case (a), apply to demonstrate that, for the purposes of section X, horses remained to be treated as animals. But what about case (b)? Mr Parke (and, to be fair to him, he had had no notice of the query) was constrained to submit that it would not be open to a court to conclude that, for the purposes of section Y, a horse was an animal. That is not our view. We cannot see how the statement of a truism can have any effect - whether directly or by implication - upon any other proposition.

27. We have referred in paragraphs 14 and 15 above to the words of Lindley LJ and of Lord Brightman on the retrospective operation of a statute. Even more trenchant, perhaps, are the words of Lloyd-Jacob J in Dunlop Rubber Co Ltd v Longlife Battery Depot (a firm) [1958] 1 WLR 1033, at p 1040:

> "The rule of construction to be aplied is not, I think, open to doubt. It is that, save as concerns procedural matters - and this exception is not here material - retrospective operation is not to be given to a statute so as to impair an existing right unless that effect cannot be avoided without doing violence to the language of the enactment."

As we have said in paragraph 23 above, the issue is not entirely clear-cut. We are prepared

to accept that our interpretation of article 4(1) of the Commencement Order and the interpretation of the dissenting Commissioner may be equally tenable. That being so, it must follow - in our judgment - that our construction is not "doing violence to the language of the enactment" (per Lloyd-Jacob J) and that the construction of the dissenting member of this Tribunal is not "unavoidable" (per Lord Brightman).

28. Our conclusion is that if Parliament intended section 53 of the Social Security Act 1986 to have retrospective effect, it omitted to say so. And it is axiomatic that the intention of the legislature must be ascertained from - and solely from - the text of its legislation. Speculation as to what may or may not have been in the legislature's corporate mind is not for the judicial authorities of this country.

29. To those who are sophisticated in the law of social security - especially the long-standing "linking" provisions in respect of periods of interruption of employment - regulation 7 of the Attendance Allowance (No. 2) Regulations 1975 (from which we quoted in paragraph 5 above) presents no problems of ready intelligibility. That may not be true of others. Certainly the evidence in the case before us suggests that neither the claimant's appointee nor her counsellor and adviser (a recognised welfare rights development officer) fully understood either regulation 7(2) or the advice they received from the Department respect thereof. They were under the misapprehension (or so the evidence suggests) th nothing need be reported until the claimant had spent a continuous period of 28 days in the Hospital - which event, of course, never occurred. The true situation was, in fact, brought to the attention of the Department by the appointee herself. She set it out on the form, signed by her on 19 February 1985, by which she made the renewal claim in prospect of the claimant's attaining the age of 16 (cf paragraph 3 above). In consequence, detailed enquiries were then set on foot by the Department. All the evidence suggests that -

(a) the appointee fully co-operated in those enquiries; and

(b) all relevant information was before the adjudication officer by August 1986.

30. Yet it was not until May 1988 that the adjudication officer issued the decision which we have summarised in paragraph 6 above. And that decision hinged, of course, on section 53 of the Social Security Act 1986, which section came into force on 6 April 1987. It would be hard indeed were the appointee to be judged by the criteria of section 53 simply because there was such an inordinate delay in the consideration of her case by the local adjudication officer. But we have not, we hope, allowed a hard case to lead us into pronouncing bad law. By the same token, we consider to be quite irrelevant to the centr issue whether or not -

(a) moral considerations enter into the obligation to refund money which was not, in the first place, properly payable; or

(b) section 119(2) was in the nature of a "concession" to claimants.

Our concern has been solely to construe the relevant legislation at its face value.

31. When the drafting of this decision had been completed, a request was received from Ms Chapman (cf paragraph 2 above) that we should hear submissions directed to a letter which we ourselves had seen after the conclusion of the initial hearing of this appeal and which had, in fact, been written to the Commissioner who had recently decided the case on Commissioner's file CG/053/1988 (cf paragraph 32 below). We granted that request. The case was listed for further hearing - and the respective advocates were as previously. We heard argument as to the effect, if any, of paragraph 5(1) of Schedule 7 to the 1986 Act upon the retrospective issue. That paragraph provides as follows:

"5.-(1) Section 53 above shall have effect in relation to the benefits specified in

paragraph 3(2) above as it has effect in relation to the benefits to which it applies by virtue of subsection (10)."

The benefits set out under section 53(10) are -

(a) benefits under the Social Security Act 1975;

(b) child benefit;

(c) income support;

(d) family credit; and

(e) a highly restricted number of social fund payments.

Paragraph 3(2) of Schedule 7 specifies benefits under a variety of statutes. (The list goes back to the National Assistance Acts.) The argument was advanced that, since Parliament has prescribed that section 53 shall have effect in relation to benefits under long-repealed statutes, it has evinced an intention that section 53 should have a generally retrospective effect. For the following reasons, we reject such argument:

(1) As Mr Rowland submitted, two of the statutes listed under paragraph 3(2) of Schedule 7 (ie the Supplementary Benefits Act 1976 and the Family Income Supplements Act 1970) remained substantially in force for more than a year after section 53 was brought into effect. But the recoverability sections in each of those Acts were repealed with effect from the day when section 53 came into effect (see the Commencement Order). Without Schedule 7 to the 1986 Act, there would have been no statutory basis for the recovery of overpayments of either supplementary benefit or family income supplement which were made after 6 April 1987.

(2) But apart from that (and, again, as Mr Rowland submitted), the legislation in respect of "late" claims is such that payments of benefit under long-repealed statutes can lawfully be (and, indeed, sometimes are) made. Where the payment is made after 6 April 1987, there is nothing inherently retrospective about applying section 53 to the question of recoverability. The relevant claimant would not, at the date of the payment, have acquired any right to avail himself of the "due care and diligence" shield.

(3) In Lauri v Renad Lindley LJ said ".... a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary" (cf paragraph 14 above). We do not accept that any inference to be drawn from Parliament's attitude to benefits under the statutes listed in paragraph 3(2) of Schedule 7 to the 1986 Act can properly be invoked in the context of benefits under the Social Security Act 1975.

(4) In any event, paragraph 5(1) of Schedule 7 contains the words "... shall have effect ... as it has effect in relation to the benefits to which it applies by virtue of subsection (10) [ie of section 53]". That seems to us to beg the very question which we have sought to answer in paragraphs 13 to 28 above.

32. In the course of the hearing we were, naturally enough, referred to the recent decision on Commissioner's file CG/053/1988. It goes without saying that we respectfully approve of and agree with what is said in paragraphs 11 to 15 of that decision. In our own paragraphs 13 to 31 we have sought to expand upon the arguments which led to the conclusion reached by the Commissioner in CG/053/1988.

Observations of Mr D G Rice

33. When a person receives something to which he is not entitled, morality invariably, and the law usually, require him to make repayment. However, under the old national insurance law a claimant, who had been overpaid benefit, might evade the obligation to repay if he could bring himself within section 119 of the Social Security Act 1975. Broadly speaking, he had to show that, in the obtaining and receipt of the relevant benefit, he, or any person acting for him, had throughout used due care and diligence to avoid overpayment. And this remained the position, as far as non-means tested benefits were concerned, until section 53 of the Social Security Act 1986 came into operation. However, under the supplementary benefit legislation, which preceded the present-day income support scheme, a claimant who had been overpaid could only escape the obligation to make repayment if he fell outside the terms of section 20 of the Supplementary Benefits Act 1976. (That section embraced the same conditions as those now contained in section 53 of the Social Security Act 1986. The criteria there laid down were different from those set out in section 119). Broadly speaking, a claimant who had been overpaid would be liable to repay, if he were guilty of a misrepresentation, or a failure to disclose, and such misrepresentation or failure to disclose led to the overpayment. Moreover, it mattered not that the misrepresentation or failure to disclose was wholly innocent.

34. It is often said that the criteria laid down by section 20 were more stringent than those specified in section 119. However, whether such was the position depended entirely upon the facts of the case. For example, if a claimant had been in receipt of regular overpayments for a substantial period of time, and on the evidence it was clear that he knew, or ought to have known, of the overpayments, but had failed to bring the matter to the attention of the local office, he could not establish that he had exercised due care and diligence. But, nevertheless, he might well have been wholly innocent of any misrepresentation or failure to make proper disclosure at the relevant time. Accordingly, it cannot be said that the requirements of section 20 were necessarily in all cases more stringent than those of section 119. However, the undesirability of applying for ever two different standards, dependent for their operation on whether or not the relevant benefit was means-tested, was clearly undesirable, and it is not surprising then to find that a common provision, to apply in all cases, was enacted under the Social Security Act 1986. The relevant provision was section 53, and this was, subject to the very important opening words referred to later, essentially in the terms of the old section 20 of the Supplementary Benefits Act 1976. Adminstrative convenience clearly called for the application of the same criteria, whatever the benefit. Moreover, in the interest of administrative convenience, it would not have been surprising to find the common standard applied from specific date, regardless of the period during which the overpayment arose. If it is borne i mind that, in any event, whether the new common provision operated more or alternatively less harshly, the claimant concerned had received a benefit to which he had never been entitled, and the only aspect of the case was whether or not he was required to make repayment, it would not be surprising, in such circumstances, to find that Parliament had, in the interests of the smooth administration of the Social Security scheme, fixed an arbitrary date for the operation of the common provision, regardless of how it affected any particular claimant.

35. In my judgment, this is exactly the effect of the new enactment. Section 53 was expressed to apply to all benefits, and it was brought into operation as from 6 April 1987 by article 4 of the Social Security Act 1986 (Commencement No. 4) Order 1986 [SI 1986 No 1959]. However, article 4 expressly excluded the operation of section 53 "in relation to any review of, or appeal from, any determination, first made before 6 April 1987, of any question of repayment or recoverability" under the enactments specified in article 4(2), which included section 119 of the Social Security Act 1975 and section 20 of the Supplementary Benefits Act 1976.

36. Unfortunately, article 4, although it deals clearly enough with determinations relating

to repayment or recoverability made from and after 6 April 1987, does not deal with the situation where the overpayment giving rise to possible repayment or recoverability occurred before that date. If the overpayment occurred before 6 April 1987, it could be said that, as far as national insurance benefits are concerned, a new standard has been imposed, and as a consequence the new legislation is retrospective in effect. I accept, of course, the operation of section 16(1)(c) of the Interpretation Act 1978, which in effect codifies the common law, and provides as follows:

> "16. - (1) Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears [my emphasis] -
>
> ...
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;
>
> ..."

In the present case, it could be said that the substitution of section 53 for section 119, where the overpayment had arisen before 6 April 1987, affected a right or, as the case might be, an obligation of the claimant concerned. It affected an accrued right if by virtue of the new provision he was rendered liable to make repayment, and likewise affected an accrued obligation if in his case section 53 proved more favourable, and he was not required to make repayment. However, section 16(1) is subject to the important proviso "unless the contrary intention appears". Of course, the contrary intention has to be clear. Thus Lindley LJ said in Lauri v Renad [1892] 3 Ch 402 -

> "It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such construction."

Moreover at pages 389-390 of Craies on Statute Law (7th edition) it is observed as follows:

> "... perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment."

This would seem to be putting the matter somewhat higher than the language of the statute would suggest, and to be something of a gloss on it. However, the passage in Craies on Statute Law would appear to be based on the words of Lloyd-Jacob J in Dunlop Rubber Co Ltd v Longlife Battery Depot [1958] 1 WLR 1033 and more recently to have been adopted by Lord Brightman in a dictum in the Privy Council case of Yew Bon Tew v Kenderaan Bas Mara [1983] AC 553 at p 558 F.

37. Nevertheless, in my judgment the language of article 4 clearly proceeds on the basis that section 53 is being brought into operation from a specific date and is to apply to all overpayments, regardless of the particular benefit to which they relate, and that the only qualification to this is that section 53 shall not apply to "any review of, or appeal from, any determination, first made before 6 April 1987, of any question of repayment or recoverability". In all other matters, by implication, section 53 shall have unfettered application. In my judgment, any other view would do violence to the language.

38. Moreover, if I am wrong in the interpretation I have adopted above, it is difficult to see what was the purpose of the exception set out in article 4. For, if the contrary intention referred to in section 16(1) did not apply, automatically section 53 would have no restrospective application to anything, and as a result the words of exception are otiose. In

my judgment, the draftsman must have intended that the words in question should mean something. Of course, they do have an effect if the interpretation favoured by me is adopted.

39. But perhaps more important than the foregoing, the opening words of section 53 - "Where it is determined that ..."- are in my judgment, crucial and decisive. Manifestly, section 53 is not concerned with when a benefit is paid (whether such payment is correct or incorrect) or, for that matter, when it is claimed; it is concerned with the time when the actual determination requiring repayment is in fact made. As and when the determination is made, the sole criteria will be those specified in section 53, and such criteria will apply regardless of the nature of the benefit and the time when the overpayment occurred. Section 53 is not an identical re-enactment of the old section 20. It is qualified by the crucial words "Where it is determined that". To say that section 53 must be limited to overpayments occurring from and after 6 April 1987 is to do violence to the clear, unequivocal opening words of the provisions. The only qualification to its general application is to be found in article 4 where the operation of section 53 is expressly excluded in the case of "any review of, or appeal from, any determination, first made before 6 April 1987, of any question of repayment or recoverability".

40. Finally, it is noteworthy that paragraph 5(1) of Schedule 7 to the Social Secu Act 1986 extends section 53 to the repealed Acts specified in paragraph 3(2). This fits into the general scheme, ensuring that section 53 applies both in the unlikely, but, as Mr Rowland has shown, technically possible, event of an overpayment occurring after 6 April 1987 as a result of an award flowing from this defunct legislation, but also in the far more probable event of an overpayment occurring from the same source long before 6 April 1987.

41. Accordingly, I am satisfied that section 53 does apply retrospectively from 6 April 1987 except as regards those matters expressly excluded from its operation. In other words, adminstrative convenience has been allowed to impose the application of a common standard from a fixed date, and this regardless of the period during which the overpayment occurred.

(Signed)

D G Rice
Commissioner

(Signed)

J Mitchell
Commissioner

(Signed)

A T Hoolahan
Commissioner

Date: 11 December 1989